

**In the United States Bankruptcy Court**  
**for the**  
**Southern District of Georgia**  
**Savannah Division**

**FILED**

at 9 O'clock & 53 min A M  
Date 10/12/04

MICHAEL F. McHUGH, CLERK  
United States Bankruptcy Court  
Savannah, Georgia *MF*

In the matter of: )

BRIAN TROY MORRIS )

*Debtor* )

Chapter 13 Case

Number 03-42764

**MEMORANDUM AND ORDER**  
**ON OBJECTION TO MODIFICATION OF PLAN**

Brian Troy Morris ("Debtor") filed a petition for relief under Chapter 13 of the Bankruptcy Code on September 3, 2003. On July 26, 2004, World Omni Financial Corporation ("World") filed an Objection to Modification of Plan on which this Court now rules, and a hearing was held on August 17, 2004. This matter is a core proceeding within the jurisdiction of this Court under 28 U.S.C. § 157(b)(2)(L). Pursuant to the following Findings of Fact and Conclusions of Law, World's Objection to Modification of Plan is sustained.

**FINDINGS OF FACT**

Debtor's original Chapter 13 Plan and Motion, filed on September 3, 2003, stated that Debtor would pay Trustee \$289.00 a month for 60 months. The plan listed World as a secured creditor, a 1997 Chevy Pickup as collateral for the debt owed to World, and the amount of the secured claim as \$8,750.00. Further, the plan provided that unsecured claims would be paid pro-rata, from funds in an amount to be estimated at

confirmation.

On February 19, 2004, Debtor filed a Chapter 13 Plan and Motion-Modified Before Confirmation. The modified plan included four important changes. First, the modified plan provided that Debtor would pay \$650.00 a month for 60 months. Second, the Chevy pickup securing World's claim was described as "not running, transmission is gone." Third, the amount of the secured claim owed to World was reduced to \$1,400.00. Finally, through an entirely honest error in preparation, the modified plan erroneously provided that unsecured claims would be paid 100% rather than pro-rata.

On March 17, 2004, a Notice of Continued Confirmation and Modification of Plan Before Confirmation was sent to interested parties, including World. The notice set a hearing date on April 13, 2004. That hearing was later continued until May 18, 2004, and notice of the new hearing was again sent to interested parties, including World. World failed to attend either hearing and no one objected to the confirmation of the modified plan. While Debtor's modified plan stated that unsecured creditors would be paid 100%, it was analyzed as a pro-rata plan at the confirmation hearing. On May 18, 2004, following the hearing, the Chapter 13 Trustee filed a Motion to Confirm Plan as Amended while not recognizing that the notice sent erroneously indicated that unsecured creditors would be paid 100%. Thus, Trustee proposed raising payments to \$764.00 per month for 60 months in order to achieve a 10% dividend to unsecured creditors. On May 21, 2004, I confirmed Debtor's modified plan that provided a 10% dividend to unsecured creditors on the

condition that Debtor pay \$766.00 per month for 60 months.

On June 7, 2004, World filed a Motion to Set Aside Order of Confirmation. In the motion, World noted that Debtor's modified plan as confirmed provided for a 10% dividend to unsecured creditors. However, the notice that World received stated that unsecured creditors would be paid 100%. World argued that had it known that unsecured creditors would only receive a 10% dividend, it would have objected to Debtor revaluing the collateral, and thus the secured claim, from \$8,750.00 to \$1,400.00. Therefore, World moved that the Order of Confirmation be set aside on the basis of inadequate notice.

A hearing was held on World's motion on July 7, 2004. At that hearing, it was undisputed that the notice sent to World provided that unsecured creditors would be paid 100%. However, Debtor intended, and the confirmed modified plan provided, that the unsecured creditors would be paid on a pro-rata basis. Thus, I orally granted World's motion to set aside the confirmation order on the basis of insufficient notice and instructed Debtor to file a modification reflecting the correct intent of the plan.

On July 23, 2004, Debtor filed a Chapter 13 Plan and Motion-Modified Before Confirmation which again listed the value of the 1997 Chevy pickup securing World's claim as \$1,400.00. In addition, it provided for a pro-rata, not 100%, unsecured dividend.

World objects to the value that Debtor's July 23, 2004, plan assigns its collateral. World cites Johnson v. General Motors Acceptance Corp. (In re Johnson), 165 B.R. 524 (S.D. Ga. 1994), for the proposition that the value of collateral should be determined as of the commencement of the bankruptcy case. World notes that Debtor testified, and his verified bankruptcy schedules confirm, that the truck was worth \$8,750.00 when he filed his Chapter 13 petition on September 3, 2003. Further, his original Chapter 13 plan also valued the truck at \$8,750.00. However, the current modified plan attempts to value the truck at \$1,400.00, and it leaves the remaining amount of approximately \$6,800.00 as unsecured.

Debtor argues that the truck is now worth only \$1,400.00 because it no longer works. Further, Debtor feels that World had a duty to object to valuation of \$1,400.00 despite the fact that it thought that its claim would be paid in full. That is, because World did not object, the valuation of \$1,400.00 should now be binding. Finally, Debtor stated that he is not in a position to raise his payments and he would likely surrender the truck if it is valued at a higher amount.

#### CONCLUSIONS OF LAW

As a secured creditor, World has objected to the Debtor's plan as modified before confirmation. World contends that Debtor has assigned an incorrect value to its collateral. When a Chapter 13 debtor proposes to retain a secured creditor's collateral and the creditor objects to the plan, the plan may be confirmed over the objection if, assuming

all other confirmation criteria are met, the secured creditor will: 1) retain its lien, and 2) receive property with a present value not less than its allowed secured claim *as of the effective date of the plan*. 11 U.S.C. § 1325(a)(5)(B).<sup>1</sup> Here, Debtor and World disagree over what is the effective date of the plan for purposes of determining the value of the collateral, the truck. World insists that the truck should be valued at \$8,750.00 which represents the value of the collateral at the time Debtor filed for relief. In contrast, Debtor has valued the collateral at its present value, \$1,400.00, because the truck can no longer be driven.

In this district, it is clear that the “effective date of the plan” for purposes of § 1325(a)(5)(B)(ii) and the valuation of collateral is the date of filing. *See Johnson*, 165 B.R. at 528. *See also Ford Motor Credit Co. v. Olson (In re Olson)*, 300 B.R. 96, 98 (Bankr. S.D. Ga. 2003) (Dalis, J.). The district court in *Johnson* stated that, “the scheme of Chapter 13 in attempting to accommodate competing goals of financial rehabilitation for the debtor and preservation of the constitutionally protected, bargained-for rights of secured

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<sup>1</sup> 11 U.S.C. § 1325(a) provides in relevant part:

[T]he court shall confirm a plan if—

....

(5) with respect to each allowed secured claim provided for by the plan--

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder[.]

creditors is best served by valuing the collateral as of the date of filing.” 165 B.R. at 528. See also In re Coleman, 231 B.R. 397, 400 (Bankr. S.D. Ga. 1999)(Davis, J.)(relying on Johnson in holding that debtor cannot shift burden of depreciation to secured creditor by surrendering vehicle post-confirmation and reclassifying remaining claim as unsecured), cited with approval in Chrysler Financial Corp. v. Nolan (In re Nolan), 232 F.3d 528, 532-35 (6th Cir. 2000). Accordingly, if Debtor intends to retain the truck, it must be valued at \$8,750.00 which represents its undisputed value at the time the Chapter 13 petition was filed.

In the alternative, Debtor has argued that World should be bound by the valuation of the truck in the modification that was confirmed on May 21, 2004, but later set aside at the July 7, 2004, hearing. Clearly this argument must fail. Debtor overlooks the essential reason for setting aside the May 21 confirmation; World was not provided with adequate notice. World brought its Motion to Set Aside Order of Confirmation shortly after it learned that unsecured creditors would be paid less than 100%. In the motion, World acknowledged that it was aware that Debtor intended to devalue the vehicle. However, it explained its failure to object by noting that the modified plan sent to creditors erroneously stated that unsecured claims would be paid 100%. It is true that in failing to object to the lower valuation World risked the loss of interest on the bulk of its claim.<sup>2</sup> However, this fact alone is not sufficient to support a finding that World waived its right to object to the

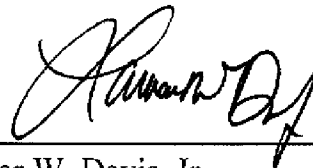
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<sup>2</sup>As a secured creditor, World was entitled to interest on its claim so that it would receive the value of its secured claim as of the effective date of the plan. 11 U.S.C. § 1325(a)(5)(B)(ii). When part of World's claim was reclassified as unsecured, it lost this entitlement to interest.

valuation of the collateral once it learned of the dividend reduction. In failing to object at the May 18, 2004, modification hearing, World may or may not have been inattentive, or it may have made a business judgment not to pay an attorney to fight over the relatively insignificant loss of interest. Regardless, there was no conscious waiver of the devaluation of the collateral by World. Once the true impact of the modified plan was made known to World, it was free to object on any ground.

### ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that World Omni Financial Corporation's Objection to Modification of Plan is sustained. Within fifteen (15) days from the date of this Order the Debtor, Brian Troy Morris, shall file any appropriate modification, or the case will be dismissed.



Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 8th day of October, 2004.

cc:

Debtor Morris  
Debtor's Atty. Gastin  
Creditor  
Creditor's Atty. Bulovic  
Trustee Brown  
U. S. Trustee  
Block

MH  
10/12/04